

AMENDED IN ASSEMBLY JUNE 24, 2004

AMENDED IN ASSEMBLY JUNE 14, 2004

AMENDED IN SENATE MAY 11, 2004

AMENDED IN SENATE APRIL 22, 2004

SENATE BILL

No. 1436

Introduced by Senator Murray

(Coauthors: Senators Bowen and Romero)

(Coauthors: Assembly Members Chavez, Shirley Horton, Koretz,
Jackson, and Nation)

February 19, 2004

An act to add Chapter 32 (commencing with Section 22947) to Division 8 of the Business and Professions Code, relating to business, *and declaring the urgency thereof, to take effect immediately.*

LEGISLATIVE COUNSEL'S DIGEST

SB 1436, as amended, Murray. Computer spyware.

Existing law provides for the regulation of various businesses by the Department of Consumer Affairs. No existing law provides for the regulation of computer spyware.

This bill would make it unlawful for a person or entity other than the authorized user of a computer owned by a person in California to cause the installation of spyware, as defined, on that computer unless the person provides a notice meeting specified requirements. The bill would, with specified exceptions, authorize the authorized user of a computer or the Internet service provider to bring an action to recover actual damages for a violation of this requirement, and would authorize these parties to recover liquidated damages of \$1,000 per violation,

subject to reduction by a court for specified reasons. The bill would provide for an award of reasonable attorney's fees and costs to a prevailing plaintiff.

This bill would provide that if any part of these provisions or their applications are held invalid, the invalidity would not affect other provisions.

This bill would declare that it is to take effect immediately as an urgency bill.

Vote: ~~majority~~ ^{2/3}. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Chapter 32 (commencing with Section 22947)
2 is added to Division 8 of the Business and Professions Code, to
3 read:

4
5 CHAPTER 32. CONSUMER PROTECTION AGAINST COMPUTER
6 SPYWARE ACT
7

8 22947. This chapter shall be known as and may be cited as the
9 Consumer Protection Against Computer Spyware Act.

10 22947.1. For purposes of this chapter, the following terms
11 have the following meanings:

12 (a) "Authorized user," with respect to a computer, means a
13 person who owns or is an authorized user of such computer. For
14 purposes of this chapter, in the case of an employer/employee
15 relationship, the employer of record is the authorized user.

16 (b) "Cause the installation" means to select and place online
17 at an online location available to the public, or directly to cause
18 placement on a computer of computer software, or any executable
19 component thereof, via the Internet or any other medium,
20 including local area networks of computers, other nonwire
21 transmissions, and disc or other data storage devices. This does not
22 include an executable that is in compliance with this chapter if
23 another, unrelated executable attaches to, through, or via another
24 unrelated executable that did not cause its installation.

25 (c) "Computer software" means a sequence of instructions
26 written in any programming language that is executed on a
27 computer.



(d) “Execute,” “execution,” and “executable,” when used with respect to computer software, refers to the performance of the functions or the carrying out of the instructions of the computer software.

(e) “First retail sale” means the sale of a computer, for a purpose other than resale, after the manufacture, production, or importation of the computer. For purposes of this chapter, the lease of a computer shall be considered a retail sale of the computer.

(f) “Internet” means the global information system that is logically linked together by a globally unique address space based on the Internet Protocol (IP), or its subsequent extensions, and that is able to support communications using the Transmission Control Protocol/Internet Protocol (TCP/IP) suite, or its subsequent extensions, or other IP-compatible protocols, and that provides, uses, or makes accessible, either publicly or privately, high level services layered on the communications and related infrastructure described in this subdivision.

(g) “Internet service provider” means an entity offering transmission, routing, or access to the Internet.

(h) “Person” means any individual, partnership, corporation, limited liability company, or other organization, or any combination thereof.

(i) “Personal information” means any of the following with regard to an authorized user:

(1) First name or first initial in combination with last name.

(2) Credit or debit card numbers.

(3) A password or personal identification number required to access a financial account.

(4) Account balances.

(5) Overdraft history.

(6) Individually identifiable payment history.

(7) Personally identifiable history of Web sites visited.

(8) Social security number.

(9) Home address.

(10) Work address.

(11) A record of a purchase or purchases.

(j) “Spyware” means a software program that self-executes on an authorized user’s computer and that is used without notice as described in Section 22947.2 to do any of the following:

1 (1) Collect and transmit personal information from an
2 authorized user of the computer for a purpose wholly unrelated to
3 the purpose of the software as described to an authorized user of
4 the computer.

5 (2) Use the authorized user's computer as part of an activity
6 performed by a group of computers that causes damage to another
7 computer, such as launching a denial of service attack.

8 (3) Deliver a pop-up on an authorized user's computer that a
9 reasonable computer user cannot close without turning off the
10 computer or closing the user's Internet browser software.

11 (4) Change the default home page of the computer user without
12 the consent of the authorized user.

13 (5) Alter the Internet service provider of the person without the
14 authorization of an authorized user.

15 (6) Use an authorized user's computer in a manner that causes
16 the person to incur monetary charges that the authorized user has
17 not authorized.

18 (7) Transmit or relay commercial electronic mail initiated by a
19 person other than the authorized user without the authorization of
20 the authorized user.

21 (k) "Web page" means a location that has a single Uniform
22 Resource Locator with respect to the World Wide Web or other
23 single location with respect to the Internet.

24 22947.2. (a) It is unlawful for any person, other than an
25 authorized user, to surreptitiously cause the installation of spyware
26 on a computer owned by a person in California, or on a computer
27 prior to the first retail sale of that computer, if that computer
28 software, or any executable component thereof is spyware, unless
29 a notice meeting the requirements of subdivision (b) is provided
30 by that person or by another person to the authorized user of the
31 computer.

32 (b) (1) The notice required under subdivision (a) shall meet all
33 of the following requirements:

34 (A) Be displayed clearly to the authorized user once, at the time
35 the software is installed, or, in the case of preinstalled software or
36 for software that is not activated upon installation, before the first
37 time the software executes one of the functions described in
38 subdivision (j) of Section 22947.1.



(B) State briefly that types of personal information, as described in subdivision (i) of Section 22947.1, the software collects and transmits.

(2) A notice is “displayed clearly” within the meaning of this subdivision if it is displayed separately from an electronic uniform license agreement and is both of the following:

(A) Written in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from the surrounding text of the same size by symbols or other marks that call attention to the language.

(B) Displayed so that a reasonable person would notice it.

(3) A single notice that applies to more than one software program satisfies the requirements of this section if the software programs are provided to the authorized user together as part of a group of software programs.

22947.3. (a) (1) In addition to any other remedies provided by this chapter or any other provision of law, an authorized user who has spyware installed or receives computer software containing spyware in violation of Section 22947.2 or the Internet service provider may bring an action against the person or entity that violated Section 22947.2 to recover either or both of the following:

(A) Actual damages.

(B) Liquidated damages of one thousand dollars (\$1,000) for each instance of spyware installed, or computer software containing spyware provided, in violation of Section 22947.2.

(2) The authorized user or the Internet service provider, if the prevailing plaintiff, may also recover reasonable attorney’s fees and costs.

(b) If the court finds that a defendant established and implemented, with due care, practices and procedures reasonably designed to effectively provide the notice required by Section 22947.2, the court shall reduce the liquidated damages recoverable under subdivision (a) to a maximum of one hundred dollars (\$100) for each instance of spyware installed, or computer software containing spyware provided, in violation of this chapter.

(c) There shall not be a cause of action under this section against an Internet service provider that is only involved in the routine transmission over its computer network of the computer software containing spyware.

1 22947.4. It is the intent of the Legislature that this chapter is
2 a matter of statewide concern. This chapter supersedes and
3 preempts all rules, regulations, codes, ordinances, and other laws
4 adopted by a city, county, city and county, municipality, or local
5 agency regarding spyware and notices to consumers from
6 computer software providers regarding information collection.

7 22947.5. The provisions of this chapter are severable. If any
8 provision of this chapter or its application is held invalid, that
9 invalidity shall not affect any other provision or application that
10 can be given effect without the invalid provision or application.

11 *SEC. 2. This act is an urgency statute necessary for the*
12 *immediate preservation of the public peace, health, or safety*
13 *within the meaning of Article IV of the Constitution and shall go*
14 *into immediate effect. The facts constituting the necessity are:*

15 *Because of the severe threat of personal identity theft and the*
16 *potential invasion of the privacy of all Californians who use the*
17 *Internet, it is necessary that this act take effect immediately.*

